

March 15, 2006, Ex Parte Handout

**USF CONTRIBUTION METHODOLOGY
CC Docket 96-45**

Telephone Number-Based Contribution Plans Must Include Number Equivalents

The Public Communications Network (PCN) is made up of the existing and future concentration of the world's public circuit switched telecommunications network (PSTN) and the existing and future Internet, which is the concentration of the world's public Internet protocol (IP) based packet switched networks. Modern digital technology allows different sectors of the communications market, such as voice, data, and video, to be merged together. This convergence is happening on a global scale and is drastically changing the way in which both people and devices communicate. At the center of this process, forming the backbone and making convergence possible, are ILEC, CLEC, cable, wireless, electric and satellite IP-based networks which will be the future PCN.

If the Commission bases the future universal service fund (USF) contribution methodology on North American Number Plan (NANP) telephone numbers and does not include functional number equivalents, the Commission will be setting the stage for industry-wide arbitrage and migration away from using NANP numbers to functional number equivalents in order to avoid payment of USF contributions. The future PCN will require universal service funding to provide affordable and comparable voice and broadband services to all Americans, urban and rural, high-cost and low-income. It will also require a USF contribution methodology that is able to evolve with the evolving PCN. If USF contributions are limited to NANP numbers only, then the inevitable migration to soft numbers will eventually eliminate all future universal service funding.

A universal service contribution methodology based solely on NANP telephone numbers would jeopardize Congress' goal of advancing and preserving universal service throughout the United States.¹ It would also prevent the Commission from achieving President Bush's goal of affordable high-speed broadband Internet access to all Americans by 2007. Regardless of the technology used, in order to provide affordable voice and broadband service to all Americans USF support will be needed for consumers living in remote, sparsely populated, high-cost areas in the United States. The Commission cannot achieve universal voice and broadband service without establishing a USF contribution methodology that will preserve and advance universal service. A future USF contribution methodology based exclusively on working NANP telephone numbers will prevent the Commission from achieving these statutory goals.

¹ Section 254(b) of the Act.

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Voice Over Internet Protocol (VoIP) Providers

The Commission should require all facilities-based and non-facilities based voice over Internet protocol (VoIP) providers to contribute to the USF mechanisms. Under the Commission's existing contribution rules, wireline and wireless carriers providing telecommunications services are required to make USF contributions to the extent they provide retail voice service to end-users. In the absence of a decision on whether VoIP providers, such as Vonage, are carriers offering "telecommunications services," the rules do not apply to VoIP carriers providing virtually the same retail voice communications services. From the customer's perspective, a VoIP provider that offers voice services to the public for a fee provides the same service as those offered by competing telecommunications, wireless, cable, satellite and municipal companies.

Telecommunications service is defined as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.² Vonage's VoIP services are advertised and sold to the public for a fee, and the fact that it uses an IP application to allow consumers to make voice calls should not remove this service from the definition of a "telecommunications service." VoIP providers use their platforms to provide voice service in direct competition with ILECs, CLECs, cable and wireless providers. None of these VoIP providers, however, have the same universal service obligations as their competitors. Contribution policies should change in order to eliminate the distinct competitive advantage these companies have over contributing companies, as well as the drain VoIP providers will impose on the interstate revenue USF assessment base. The Commission should define all VoIP services that allow their customers to interconnect with the public communications network as "telecommunication services," and assess these service revenues to further the Commission's universal service goals. Section 254(d) provides the Commission this permissive authority.

Statutory Problems Related to Information Services and USF Contributions

NTCA cautions the FCC not to assume that it can classify Vonage-like VoIP service as an "information service" and use its Section 151 ancillary jurisdiction to require VoIP providers to contribute to the USF mechanisms. The Commission's Section 151 ancillary authority is limited by its Section 254(d) permissive authority, which provides the FCC with authority to assess USF contributions from other providers of interstate "telecommunications," not providers of "information services." If Vonage-like VoIP service is classified as an information service and these VoIP providers are required contribute to the USF mechanisms based on their information service revenues, they will very likely challenge this ruling as being outside the FCC statutory authority.

² 47 U.S.C. § 153(46).

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Statutory Problems Related to NANP Numbers-Based USF Contributions Proposals

The FCC should not assume that it can assess USF contributions from Vonage-like VoIP providers based on working North American Number Plan (NANP) telephone numbers, if the Commission classifies Vonage-like VoIP service as an “information service.” The Commission jurisdiction and authority over NANP telephone numbers is derived from Section 151 of the Act.³ The Commission’s NANP rules state that “the purpose of these rules is to establish, for the United States, requirements and conditions for the administration and use of telecommunications numbers for provision of telecommunications services.”⁴ Here again, if Vonage-like VoIP providers are using working NANP telephone numbers to provide information service, they will likely challenge the FCC’s ruling as beyond its statutory authority and in violation of its own rules.

To avoid the possibility of an FCC decision requiring USF contributions from Vonage-like VoIP providers from being reversed on appeal, NTCA urges the Commission to classify Vonage-like VoIP service as a “telecommunications service.” Most VoIP providers, including AT&T and Vonage, charge customers a fee for sending and receiving voice calls. VoIP providers also use NANP telephone numbers to facilitate voice calls throughout the PSTN. And they use the public communications network in the same way as other carriers who pay access and contribute to universal service in recognition of the fact that their use imposes costs on the underlying carrier networks that makeup the public communications network. The fact that VoIP providers use the public network, use NANP telephone numbers, and charge customers for voice service, clearly demonstrates that Vonage-like VoIP service is a telecommunications service and should be required to pay USF contributions based on these telecommunications service revenues.

Wireless Providers

NTCA urges the Commission to modify the existing revenue-based USF contribution mechanism by eliminating or raising the wireless carrier safe harbor provision. Eliminating or raising the wireless safe harbor and expanding the pool of contributors will ensure a sufficient and continuous revenue-base for the interstate universal service mechanisms and create a more level playing field in the rapidly evolving and increasingly competitive communications services market.

Today, wireless customers have the option of receiving an itemized monthly bill listing each call by telephone number with the associated minutes for each call. This itemization enables both the wireless customer and wireless carrier to distinguish between local and long distance calls each month, thus making it possible to allocate interstate revenues based on total interstate minutes by

³ 47 C.F.R. § 52.1(a).

⁴ 47 C.F.R. § 52.1(b).

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each wireless carrier. By distinguishing a wireless carrier's total interstate minutes for the relevant contribution period, these minutes can then be multiplied by the appropriate interstate revenue allocator to determine the carrier's total interstate revenues for the relevant period. The Commission can then determine the wireless carrier's true interstate USF obligation by multiplying the newly calculated interstate revenues by the quarterly USF contribution factor to ascertain the wireless carrier's equitable and non-discriminatory interstate USF contribution obligation.

The Discriminatory and Inequitable Impact of the CTIA USF Contribution Proposal

Section 254(d) requires the Commission to maintain a USF contribution methodology that ensures that all providers of interstate telecommunications contribute on an equitable and nondiscriminatory basis. CTIA's USF contribution proposal, however, recommends that USF contribution assessments for wireless carriers be based on a formula that allows month-to-month wireless customers, prepaid wireless customers, corporate plan wireless customers and family plan wireless customers to pay only 50 percent of the USF contribution assessment based on working telephone numbers or number equivalents.⁵ Conversely, CTIA's proposal would require all month-to-month landline customers, prepaid landline customers, landline corporate plan customers and all landline family plan customers to pay 100 percent of the USF contribution assessment based on working telephone numbers or number equivalents. The CTIA proposal unjustly and unfairly favors wireless carriers over landline, cable, electric, and municipal carriers in obvious violation of Section 254(d).

Moreover, CTIA's proposal would only assess telecommunications providers that provide consumers with actual working telephone numbers or functional equivalent numbers, which means incumbent local exchange carriers (ILECs) and competitive local exchange numbers (CLECs) would be unjustly assessed the largest share of USF contributions. Because interexchange carriers (IXCs) do not provide their residential customers with working telephone numbers or number equivalents, IXC residential interstate telecommunications services would be exempt from USF contributions under the CTIA proposal.⁶ This would dramatically reduce IXC USF contributions and significantly increase landline carrier USF contributions. The proposal as a whole would discriminate most severely against landline ILECs and CLECs and raise their USF contributions on a per customer basis substantially higher than wireless carriers and IXCs. CTIA's proposal is not only discriminatory and inequitable towards landline providers; it is neither competitively neutral nor technology neutral. The Commission therefore should reject it.

⁵ CTIA Ex Parte Filing, p. 5, CC Docket No. 96-45, filed on January 31, 2006.

⁶ IXCs only use a small portion of NANP telephone numbers for their special assess customers which are typically business customers.

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Broadband/High-Speed Internet Access Providers

NTCA urges the Commission to modify the existing revenue-based USF contribution mechanism by expanding the pool of USF contributors to include cable, wireless, electric, and satellite broadband Internet access providers. Section 254(d) specifically provides the Commission with permissive authority to require any provider of interstate “telecommunications” to contribute to universal service. Using this authority the Commission has required some entities that provide interstate telecommunications to end-users for a fee to contribute to the universal service mechanisms.

Under the Commission’s existing USF contribution rules wireline telecommunications carriers providing broadband transmission services are required to make USF contributions to the extent they provide broadband transmission services or other telecommunications services on a stand alone basis to affiliated or non-affiliated Internet service providers (ISPs) or end-users.⁷ These rules, however, do not apply to cable, wireless, electric and satellite providers of broadband transmission services or broadband Internet access services.

In *Brand X*, the Supreme Court stated “the Commission reasonably concluded a consumer cannot purchase Internet service without also purchasing a connection to the Internet and the transmission always occurs in connection with information processing.”⁸ In the *Wireline Broadband Classification Order*, the Commission concluded that wireline broadband Internet

⁷ In the Commission’s most recent Wireline Broadband Internet Access Classification Order, the FCC required wireline facilities-based providers to contribute to existing universal service funding (USF) mechanisms based on their current levels of reported revenues for DSL transmission services for a 270-day period after the effective date of the order or until the FCC adopts a new contribution rules, whichever occurs earlier. If the FCC is unable to establish new contribution rules within the 270-day period, the Commission will take whatever action is necessary to preserve the existing funding levels, including extending the 270-day period or expanding the based USF contribution base. *In the Matter of the Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers*, Review of Regulatory Requirements for Incumbent LEC Broadband Transmission Services, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision for Enhanced Services*; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguard Requirements, CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under U.S.C. §160(c) with Regard to Broadband Services Provided Via Fiber to the Premises*; *Petition of Verizon Telephone Companies for Declaratory Ruling or Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*; WC Docket No. 04-242; *Consumer Protection in the Broadband Era*, WW Docket No. 05-271. Report and Order and Notice of Proposed Rulemaking (rel. Sept. 23, 2005)(Wireline Broadband Classification Order) Also see, *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, *Universal Service Obligations of Broadband Providers*, and *Computer III Further Remand Proceeding: Bell Operating Company Provision of Enhances Services: 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Dockets Nos. 95-20, 98-10, FCC 02-42, Notice of Proposed Rulemaking (NPRM) ¶¶ 71, 72, and 79 (rel. Feb. 15, 2002).

⁸ *NCTA v. Brand X*, slip op. at 20, (June 27, 2005). A copy of the Brand X Slip Opinion can be found at <http://www.fcc.gov/ogc/documents/opinions/2005/04-277-062705.pdf>.

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access service provided over a provider's own facilities is an "information service."⁹ The Commission also determined that "wireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."¹⁰ The Commission further held that "consistent with *Brand X*, such a transmission component is mere telecommunications."¹¹

The regulatory classification of cable¹² and wireline broadband Internet access service as an information service does not preclude the Commission requiring all providers of broadband Internet access service to contribute to the USF mechanisms based on the revenues derived from these services. The underlying transmission component of all broadband Internet access services is "telecommunications" as defined by the Act.¹³ Section 254(d) specifically provides the Commission with permissive authority to require any other provider of interstate "telecommunications to contribute to universal service."

⁹ *In the Matter of Appropriate frameworks for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, *Universal Service Obligations of Broadband Providers*, CC Docket No. 01-337, *Review of regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, *Computer III Further Remand Proceeding: Bell Operating Company Provision of Enhanced Services*; *1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*; CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under Section 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises*; *Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242, *Consumer Protection in the Broadband Era*, EC Docket No. 05-271, FCC 05-150, ¶ 9 (rel. Sept. 23, 2005). (*Wireline Broadband Classification Order*).

¹⁰ *Id.*, at ¶ 12. The Commission limited this order to wireline broadband Internet access service and its underlying broadband transmission component whether the component is provided over copper loops, hybrid copper-fiber loops, fiber to the curb or fiber to the premise (FTTP) network, or any other type of wireline facilities, and whether that component is provided using circuit switched, packet-based, or any other technology. ¶¶ 112-113. After a transition period established by the order, ILECs that choose to offer broadband Internet access on a common carrier basis will continue to be liable for USF contributions based on the revenues from those offerings. ILECs that choose to offer broadband Internet access on a private carriage basis after the transition, their revenues from the offering would not be subject to USF contribution assessments. ¶ 9, footnote 15.

¹¹ *Id.*, at ¶ 104.

¹² *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over cable and Other Facilities*, *Internet Over Cable Declaratory Ruling*, GN Docket No. 00-185; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over cable Facilities*, CS Docket No. 02-52, FCC 02-77, ¶ 7 (rel. March 5, 2002). (cable-modem high-speed Internet access service, as it is currently offered, is classified as an interstate information service).

¹³ Telecommunications is defined as the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received. 47 U.S.C. § 153(43). Information service is defined as the offering of a capability for generating acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. 47 U.S.C. § 153(20).

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The future public communications network will require universal service funding to provide affordable and comparable voice and broadband services to all Americans, urban and rural, high-cost and low-income. It will also require a USF contribution methodology that is able to evolve with the future public communications network that will rely on IP-based transmission services. If USF contributions are limited to traditional wireline and wireless voice services only, the inevitable migration away from these services will eliminate all future universal service funding. NTCA therefore urges the Commission keep pace with how competitors use different facilities and technologies as substitutes for traditional circuit switched telecommunications services and wireline broadband Internet access services and require all cable, wireless, electric and satellite broadband Internet access providers to contribute to the federal universal service fund.

NTCA's Recommendation

Commission should strive for a competitively neutral, equitable, and non-discriminatory USF contribution methodology that preserves and advances universal service. To achieve this end, the Commission should modify the existing revenue-based USF contribution mechanism by expanding the pool of USF contributors to include cable, wireless, electric, and satellite broadband Internet access providers. Providers of broadband transmission or other telecommunications services on a stand alone basis to affiliated or non-affiliated ISPs or end-users should be required to contribute on an equitable and non-discriminatory basis.

All facilities-based and non-facilities based VoIP providers should also be required to contribute to the existing revenue-based USF mechanism. The Commission should also modify the existing revenue-based USF contribution mechanism by eliminating or raising the wireless carrier safe harbor provision. Eliminating or raising the wireless safe harbor and expanding the pool of contributors will ensure a sufficient and continuous revenue-base for the interstate universal service mechanisms and create a more level playing field in the rapidly evolving and increasingly competitive communications services market.

The goals of universal service cannot be met without the broad support for the underlying networks that carry their VoIP as well as circuit switched traffic. Failing to position non-wireline broadband Internet access providers, VoIP providers, and wireless providers on equal footing with existing wireline USF contributors will continue to place existing wireline contributors at a distinct competitive disadvantage and further drain revenues from the existing USF contribution revenue assessment base. Without competitive neutrality, the disparate regulatory treatment of non-wireline broadband providers, VoIP providers and wireless providers will continue invite arbitrage and create false economic incentives that will undermine the very networks that make up the PCN. NTCA therefore urges the Commission to adopt its proposed recommendations.